-142A

Supreme Court, U.S.
FILED
OCT 12 2006
OFFICE OF THE CLERK

(24)

No. 05-381

IN THE
SUPREME COURT OF THE UNITED STATES

WEYERHAEUSER COMPANY, Petitioner,

v.

ROSS-SIMMONS HARDWOOD
LUMBER COMPANY, INC., Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* FOREST INDUSTRY PARTICIPANTS SUPPORTING RESPONDENT

R. DANIEL LINDAHL
Counsel of Record
BULLIVANT HOUSER BAILEY, PC
300 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 228-6351
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 8

THIS COURT SHOULD NOT APPLY THE *BROOKE GROUP* TEST TO ROSS-SIMMONS'S PREDATORY-BIDDING CLAIM 8

A. This Court has traditionally decided antitrust cases by applying broad principles to the specific circumstances of the case before it, paying special attention to the economic realities of the market at issue 8

B. Modern economic analysis has called into doubt the assumptions that were the basis for this Court's Brooke Group decision 11

C. *Brooke Group* requires difficult and subjective analyses 13

D. The Ninth Circuit properly considered market elasticity and correctly concluded that the Pacific Northwest market for alder sawlogs is inelastic 16

E. The Pacific Northwest alder sawlog market is vulnerable to predatory conduct by a dominant firm 20

F. *Reid Bros.* undermines Weyerhaeuser's contention that the Ninth Circuit's decision will have harmful economic repercussions 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 9

Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) ..... *passim*

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) 9, 10, 11, 20

Maple Flooring Manufacturers Ass'n. v. United States, 268 U.S. 563 (1925) 10

Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir. 1983) 6, 24, 25

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993) 8, 9

Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917 (6th Cir. 2005) 14

United States v. Grinnell, 384 U.S. 563 (1966) 9

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004) 6, 9, 10

Statutes

Sherman Act, § 2, 15 U.S.C. § 2 ..... 3, 8

Page

Articles and Books

Best and Wayburn,
America's Private Forests (2001).....2

Patrick Bolton, Joseph F. Brodley, and Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*,
88 Geo. L. J. 2239 (2000)..... 12, 13

James Dalton and Louis Esposito, *Predatory Price Cutting and Standard Oil: A Reexamination of the Trial Record*, Research in Law and Economics (2006, forthcoming).....12

Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*,
73 Antitrust L. J. 435 (2006) 10

Richard A. Posner, *Antitrust Law: An Economic Perspective*,
University of Chicago Press (1976) 12

No. 05-381

IN THE SUPREME COURT OF THE UNITED STATES

WEYERHAEUSER COMPANY, Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC., Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* FOREST INDUSTRY PARTICIPANTS SUPPORTING RESPONDENT

INTEREST OF *AMICI CURIAE*

This brief is submitted by two national organizations and five other organizations and firms involved in the forestry industry (collectively, the "Forest Industry Participants").[1] The Forest Industry

---

[1] The required consent letters have been filed. These *amici* state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Participants represent every facet of the forestry industry: timberland owners, loggers, and sawmills. Consequently, they are knowledgeable about the market at issue in this case and how the applicable legal rules would affect competition in that market.

National Woodland Owners Association (NWOA) is a nationwide organization of nonindustrial private woodland owners. NWOA has 27,000 members from all 50 states. NWOA is independent of the forest products industry and government forestry agencies. Its purpose is to promote nonindustrial forestry and the best interests of woodland owners. As an ownership class, nonindustrial forest landowners possess 48 percent of the forest land in the United States, with 82 percent of that land in ownerships of 500 acres or less. Best and Wayburn, *America's Private Forests* 6 (2001).

American Loggers Council (ALC) is the national organization of professional loggers in the United States and includes a coalition of 29 state and regional logging associations and councils. ALC represents more than 10,000 logging contractors with more than 50,000 employees. Together, NWOA and ALC account for a far higher percentage of U.S. log sales annually than the industrial class of forest landowners, which account for only 9.65 percent of U.S. forest land. *Id.* at 4.

Small Business Timber Council (SBTC) is an organization of family-owned forest products companies in western Oregon that operate 11 sawmills, 8 plywood, veneer, or laminated beam plants, and employ 2,400 workers in 10 Oregon communities. SBTC members are dependent on open market timber from private, federal, and state forests. Several SBTC members are industrial owners of private forest land, some exceeding 100,000 acres.

Smith Street Mill, Inc. and Alexander Lumber Mill, Inc. are family-owned alder sawmills operating in Everett and Onalaska, Washington, respectively. Hardwood Components, Inc. is a family-owned hardwood sawmill in Mehama, Oregon. Morton Alder Mill, Inc. owned and operated an alder sawmill in Willamina, Oregon, for more than 50 years before closing in 2002. All four of these mills were plaintiffs in successful antitrust cases against Weyerhaeuser that settled before trial.[2]

As experienced participants in the forest industry, these *amici* believe they can be of assistance to the Court as it addresses the questions raised here.

SUMMARY OF ARGUMENT

This case arises under § 2 of the Sherman Act, 15 U.S.C. § 2, which makes it unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize, any part of the nation's interstate or foreign commerce.

Here, Ross-Simmons Hardwood Lumber Company alleged that Weyerhaeuser Company violated § 2 by using a diverse array of anticompetitive tactics to either monopolize, or attempt to monopolize, the Pacific Northwest market for alder sawlogs. Ross-Simmons alleged that one of Weyerhaeuser's tactics—but not its *only* tactic—was predatory bidding for alder sawlogs. In particular, Ross-Simmons alleged that Weyerhaeuser used its market power to intentionally

---

[2] Alexander Lumber Mill and Morton Alder Mill, Inc. settled their claims in *Westwood Lumber Co. v. Weyerhaeuser*, District of Oregon No. 03-0551-PA, as part of a $34.5 million settlement. Smith Street Mill, Inc. and Hardwood Components, Inc. settled their claims in *Smith Street Mill, Inc. v. Weyerhaeuser*, District of Oregon No. 04-1049-PA, as part of a $13.1 million settlement.

bid up the price for sawlogs to a level where Ross-Simmons (and other Weyerhaeuser competitors) could no longer operate profitably, resulting in Ross-Simmons's demise and, consequently, one fewer competitor for Weyerhaeuser. According to Ross-Simmons's theory, predatory bidding was one element of Weyerhaeuser's overall strategy to eliminate competition for alder sawlogs so that Weyerhaeuser could then use its unchecked market power to drive down prices and enjoy monopoly profits resulting from a low-cost alder supply.

After hearing all the evidence, including Weyerhaeuser's attempts to explain its actions, a jury found for Ross-Simmons on both its monopolization and attempted monopolization claims and awarded damages of $26,256,406 (which were subsequently trebled). (J.A. 967a.) That verdict was affirmed by the United States Court of Appeals for the Ninth Circuit. (Pet. App. 1a-27a.)

In this Court, Weyerhaeuser and its supporting *amici* argue that the proceedings below were flawed because the jury was incorrectly instructed regarding when predatory bidding can be found to violate § 2. Weyerhaeuser's overarching argument is that a § 2 claim based on predatory bidding must be governed by the two-part test for predatory pricing that this Court described in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Weyerhaeuser and its *amici* advance several arguments in support of their contention that *Brooke Group* should be applied outside the predatory-pricing context for the first time. Among those arguments are: (1) *Brooke Group* provides an unambiguous standard that businesses and juries can easily understand and apply; (2) in rejecting *Brooke Group*, the Ninth Circuit erred by considering the elasticity of the Pacific Northwest

market for alder sawlogs, and then compounded that error by incorrectly characterizing the market as inelastic; (3) the *Brooke Group* test is appropriate for the market at issue in this case; and (4) the Ninth Circuit's decision is both overly restrictive and needlessly vague, and will cause catastrophic economic disruption by chilling aggressive competition. Each argument lacks merit.

The *Brooke Group* test is more complex and subjective than Weyerhaeuser admits. *Brooke Group's* two-part test requires complicated analyses of cost and the probability that a predator can recoup the losses it incurred in pursuing its anticompetitive strategy. As *Brooke Group* itself demonstrates, these are not simple, objective computations that produce unassailable results. Instead, they are complicated, demanding inquiries that turn on multiple subjective factors. Consequently, if adopted, *Brooke Group* would not provide the benefits of ease and simplicity that Weyerhaeuser promises.

In analyzing whether to apply the *Brooke Group* test in the context of a predatory bidding claim, the Ninth Circuit considered the elasticity of the market because elasticity is relevant to the probability that a predatory-bidding scheme will succeed. Weyerhaeuser criticizes that aspect of the Ninth Circuit's decision on the grounds that elasticity is too complex to have a role in the analysis. But Weyerhaeuser's proposed alternative would not avoid the market-elasticity inquiry because the *Brooke Group* test requires evaluating market elasticity as part of assessing the probability that a predator will recoup its losses. Weyerhaeuser also criticizes the Ninth Circuit's conclusion that the Pacific Northwest alder-sawlog market is inelastic. But the trial evidence established

that alder supply does not respond to price changes. Therefore, the Ninth Circuit's conclusion was correct.

This Court has stressed that "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004). Therefore, it is important to scrutinize the market involved in this case. Such an analysis reveals that the market has several characteristics that make it especially vulnerable to the type of predatory scheme Weyerhaeuser devised here. Those characteristics include (1) its inelasticity; (2) the fact that alder sawlogs are neither imported into, nor exported out of, the Pacific Northwest because long-distance transportation is infeasible; (3) there are high barriers to entry by competitors; and (4) Weyerhaeuser could concentrate its anticompetitive conduct on only a relatively narrow portion of the overall market. These characteristics require a rule of law adequate to protect the market against anticompetitive conduct.

Finally, Weyerhaeuser advocates the adoption of a narrow rule that would immunize most price-related predatory conduct because predatory-bidding schemes are supposedly unlikely to be tried and even more unlikely to succeed. And Weyerhaeuser warns of dire consequences certain to flow from the Ninth Circuit's decision. These contentions are refuted by the Ninth Circuit's decision in *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983).

Reid Bros. involved a predatory scheme designed to extinguish competition in the southeastern Alaska timber market. The defendants in *Reid Bros.* employed many of the same tactics that Weyerhaeuser later put to effective use against Ross-Simmons and other rivals. In affirming a judgment against the defendants for

violations of Sherman Act §§ 1 and 2, the court rejected the defendants' argument that predatory bidding for timber should be lawful as a matter of law so long as the predator did not experience a loss on the sale of processed lumber.

Reid Bros. shows two things. First, it refutes the argument that predatory bidding schemes are both unlikely to be tried and unlikely to succeed. The scheme in *Reid Bros.* succeeded completely. Second, it refutes the argument that the Ninth Circuit's decision in this case will cause adverse economic consequences by chilling legitimate competition and paralyzing commerce with fear of antitrust liability. *Reid Bros.* had no such effect, nor would a decision by this Court holding that the lawfulness of a predatory bidder's actions will be assessed by more than simply whether the predatory actor sold its finished product for a gain or a loss.

The real risk posed by this case is what will happen if the Court adopts Weyerhaeuser's position and applies *Brooke Group* in the predatory-bidding context. Because the forest industry is vulnerable to anticompetitive conduct by dominant firms, it is important to the Forest Industry Participants that antitrust law remain a viable deterrent to predatory behavior. Because the test urged by Weyerhaeuser would insulate much price-related conduct from antitrust scrutiny, thereby weakening the antitrust laws, the Forest Industry Participants urge this Court to not adopt the *Brooke Group* test for predatory-bidding claims.

ARGUMENT

THIS COURT SHOULD NOT APPLY THE *BROOKE GROUP* TEST TO ROSS-SIMMONS'S PREDATORY-BIDDING CLAIM.

A. This Court has traditionally decided antitrust cases by applying broad principles to the specific circumstances of the case before it, paying special attention to the economic realities of the market at issue.

Section 2 of the Sherman Act makes it unlawful to monopolize or attempt to monopolize interstate or foreign commerce:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100 million if a corporation, or, if any other person, $1 million, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.

Because § 2 is written in general terms, it does not specify the elements of a claim for monopolization or attempted monopolization. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454 (1993). Instead, the Sherman Act's legislative history "indicate[s] that much of the interpretation of the necessarily broad principles of the Act was to be left for the courts in particular

cases." *Id.* Consequently, this Court has had to articulate the specific elements of § 2 claims.

A monopolization claim requires proof of "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966). A claim for attempted monopolization requires proof of (1) the relevant market that the defendant sought to monopolize, (2) predatory or anticompetitive conduct, (3) specific intent to acquire monopoly power within the market, and (4) a dangerous probability of success. *Spectrum Sports*, 506 U.S. at 459. Thus, both a monopoly claim and an attempted monopoly claim require proof of intentional anticompetitive conduct.

Although this Court has had several occasions to consider § 2 claims,[3] it has declined to announce a definitive, one-size-fits-all standard for what constitutes unlawful anticompetitive conduct for purposes of a § 2 claim. Instead, this Court has defined anticompetitive conduct in broad terms. In *Grinnell*, 384 U.S. at 570-71, the Court defined anticompetitive conduct by exclusion, explaining that it is the acquisition or maintenance of market power through means other than "growth or development as a consequence of a superior product, business acumen, or historic accident." In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985), this Court looked to whether the defendant's actions had

---

[3] *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *Spectrum Sports*, 506 U.S. 447; *United States v. Grinnell*, 384 U.S. 563 (1966); *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

"impaired competition in an unnecessarily restrictive way," and examined the effect of the challenged conduct on consumers, the plaintiff, and the defendant itself. In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), this Court asked whether "valid business reasons" explained Kodak's allegedly unlawful actions.

Thus, this Court has generally eschewed particularized standards for defining § 2 anticompetitive conduct, preferring to establish broader standards that provide lower courts with guidance, but that also leave room for tailoring the standards in a given case to the often unique circumstances of the conduct and market involved.[4] Such an approach is consistent with this Court's view that "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004). Consequently, this Court has said "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." *Eastman Kodak*, 504 U.S. at 466-67. Instead, this Court has "preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Id.* at 467 (quoting *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563, 579 (1925)). Thus, this Court has traditionally decided cases by applying broad antitrust principles to "the economic reality of the market at

---

[4] *See* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 Antitrust L. J. 435, 481 (2006) ("Section 2 is not 'one size fits all.' Recognizing that different circumstances can warrant dissimilar treatment, courts have crafted an array of legal tests to govern the diverse conduct covered by Section 2.").

issue" rather than by relying on formulaic tests. *Id.* at 467.

B. Modern economic analysis has called into doubt the assumptions that were the basis for this Court's *Brooke Group* decision.

Predatory pricing is one context in which this Court has departed from its usual practice by adopting a specific test for assessing allegedly anticompetitive conduct. *Brooke Group*, 509 U.S. 209, arose from a price war between competing makers of "economy" cigarettes. In *Brooke Group*—unlike the present case—there was only a single type of allegedly anticompetitive conduct: defendant's aggressive reduction of the price for its economy cigarettes.

This Court articulated a two-part test for assessing such claims of predatory price cutting by a product seller. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* at 222. If below-cost pricing is established, "The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a * * * dangerous probability[] of recouping its investment in below-cost prices." *Id.* at 224.

Weyerhaeuser asks this Court to lengthen *Brooke Group's* reach by applying it to predatory-bidding claims. But this Court should exercise caution about such a move when there is growing doubt about the economic assumptions that informed the *Brooke Group* decision.

The *Brooke Group* test reflects this Court's view at that time that "predatory pricing schemes are rarely

tried, and even more rarely successful." *Id.* at 226. The Court's acceptance of that view is not surprising since it was "the only economic view presented to the Court."[5]

The economics literature cited to the Court in *Brooke Group*, and the conclusion that predatory pricing is rarely tried and even more rarely successful, relied on the work of McGee, who in 1958 examined the trial-court record in the 1911 Standard Oil Trust case and other cases.[6] But recent scholarly reexamination of that evidence has brought into doubt McGee's central conclusion that Standard Oil had not engaged in predatory pricing:

> We examined this record and have found that the trial Record contains considerable evidence of predatory pricing by Standard Oil. Therefore, the Record does not support McGee's conclusion that Standard Oil did not engage in predatory pricing.[7]

Most economists no longer support the view that predatory pricing is rare and unlikely to succeed. Professors Bolton, Brodley, and Riordan have said in their joint analysis[8] that "sound empirical and experimental studies, as well as modern economic

---

[5] Patrick Bolton, Joseph F. Brodley, and Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L. J. 2239, 2257 (2000).

[6] Richard A. Posner, *Antitrust Law: An Economic Perspective*, University of Chicago Press (1976).

[7] James Dalton and Louis Esposito, *Predatory Price Cutting and Standard Oil: A Reexamination of the Trial Record*, Research in Law and Economics (2006, forthcoming).

[8] Patrick Bolton, Joseph F. Brodley, and Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L. J. at 2249 (2000) ("To summarize, present judicial skepticism about predatory pricing assumes that predation is extremely rare, but sound empirical and experimental studies, as well as modern economic theory, do not justify this assumption.")

theory" do not support the conclusion that predatory pricing is rare:

> modern economic analysis has developed coherent theories of predation that contravene earlier economic writing claiming that predatory pricing conduct is irrational. More than that, it is now the consensus view in modern economics that predatory pricing can be a successful and fully rational business strategy.[9]

Thus, as this Court considers whether to extend *Brooke Group* to the realm of predatory bidding, it should consider the growing consensus that, even in the predatory-pricing context, *Brooke Group* reflects a now-outmoded view of the frequency and potential success of predatory pricing.

C. *Brooke Group* requires difficult and subjective analyses.

Weyerhaeuser asks this Court to apply the *Brooke Group* test to Ross-Simmons's predatory-bidding claim. According to Weyerhaeuser and its *amici*, *Brooke Group* offers an objective and easily applied test that would establish unambiguous standards to guide businesses and juries, thereby eliminating both confusion in the boardroom and false positives in the courtroom. But *Brooke Group* is not the panacea that Weyerhaeuser suggests.

Brooke Group calls for two inquiries: (1) whether the defendant sold its product at a price below an appropriate measure of its costs; and (2) whether there was a dangerous probability of the defendant recouping the losses caused by its pricing conduct. *Id.* at 222, 224. Although this appears to be an objective test, in

---

[9] *Id.* at 2241.

reality both cost and recoupment are complicated questions that turn on many subjective factors.

With regard to the question of cost, in *Brooke Group* this Court declined to decide what methodology should be used to determine a seller's appropriate measure of costs. *Id.* at 222 n.1. And 13 years later, determining a seller's cost remains a disputed and complicated question. The Sixth Circuit's decision in *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005) provides an apt example.

Spirit Airlines involved a § 2 predatory-pricing claim against Northwest Airlines. In reversing a summary judgment for Northwest Airlines, the Sixth Circuit devoted 10 pages to analyzing the appropriate-measure-of-costs issue, before concluding that *both* parties had presented plausible cost theories, creating an issue of fact for the jury. *Id.* at 945 ("We conclude that this 'intellectual disagreement' among the parties' experts creates material factual disputes on the relevant market and the appropriate measure of costs for the service at issue so as to preclude an award of summary judgment.").

Spirit Airlines refutes the notion that calculating the appropriate measure of costs is an easily performed task that inevitably produces a single indisputable answer. Furthermore, as Ross-Simmons discusses in its merits brief, in relation to a predatory-bidding claim, the cost inquiry would be even more problematic because in that context there is no established test for calculating cost—and neither Weyerhaeuser nor its *amici* have suggested one. Thus, determining cost is not a simple, objective inquiry.

The best that can be said of the cost question is that it is marginally more objective and less complicated than the second prong of the *Brooke Group* test: assessing a predatory seller's probability of

recoupment. There is nothing either objective or simple about the recoupment inquiry—as *Brooke Group* itself vividly demonstrates.

Assessing the probability of recoupment is a complex factual question that depends on numerous equally complex factors. As this Court explained, "Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a *close analysis* of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market." *Brooke Group*, 509 U.S. at 226 (emphasis added). Such a "close analysis" requires considering at least these questions:

- How long would the predation have lasted? *Brooke Group*, 509 U.S. at 225.
- What was the financial strength of the predator? *Id.*
- What was the financial strength of the intended victim? *Id.*
- If the predation succeeded in eliminating competition, was the market such that prices would have then adjusted to permit the predator to recoup its losses? In other words: was the market elastic or inelastic? *Id.*
- How long would the predator be able to reap supracompetitive prices? *Id.*
- What are the barriers to entry to the market? *Id.*

These are not simple questions with a single, obvious answer—as *Brooke Group* itself illustrates. *Brooke Group* came to this Court from a judgment as a matter of law for the defendant. Consequently, this Court scrutinized the case's factual record to determine whether there was any evidence from which a trier of

fact could find that the defendant had a dangerous probability of recoupment. *Id.* at 230. This Court's analysis—which Weyerhaeuser repeatedly minimizes—runs from pages 230 to 243 of the Court's opinion and concludes with the Court noting that "the chain of reasoning by which we have concluded that Brown & Williamson is entitled to judgment as a matter of law is *demanding*." *Id.* at 243 (emphasis added).

Thus, the *Brooke Group* test's primary virtues—its supposed objectivity and resulting ease of application—are illusory. If applied to the predatory-bidding context, *Brooke Group* would provide corporate directors and jurors with no easily determined, bright-line standard for what constitutes unlawful anticompetitive conduct. Instead, it would require an analysis just as complicated and just as demanding as other § 2 cases, except that the inquiry would be confined to questions of (1) cost and (2) probability of recoupment, without a complete examination of the predator's conduct in the context of the economic realities of the market—the approach this Court has consistently endorsed outside the predatory-pricing realm.

D. The Ninth Circuit properly considered market elasticity and correctly concluded that the Pacific Northwest market for alder sawlogs is inelastic.

In evaluating whether to apply the *Brooke Group* test in this case, the Ninth Circuit Court of Appeals considered the unique characteristics of the Pacific Northwest market for alder sawlogs, including that market's elasticity, *i.e.*, the extent to which the supply of alder sawlogs reacts to price changes by either increasing in response to rising prices, or decreasing in response to declining prices. (Pet. App. 11a.) Weyerhaeuser and its *amici*, in particular the

Timberland Owners and Managers, charge that this aspect of Ninth Circuit's analysis is flawed in two respects: (1) the *Brooke Group* test should apply in every predatory-bidding case without regard to market elasticity because requiring an examination of market elasticity "would entail endless ambiguity and uncertainty";[10] and (2) the Ninth Circuit incorrectly concluded that the Pacific Northwest market for alder sawlogs is inelastic.

The first argument—that market elasticity is too complex to be part of the analysis—is puzzling given that Weyerhaeuser and its *amici* advocate the adoption of a test that *requires* analyzing market elasticity. Probability of recoupment is an element of the *Brooke Group* test, and market elasticity is an important factor in assessing a predator's likelihood of recouping its losses. As the United States concedes, "if supply in the input market at issue is inelastic, it is more likely that an attempt to engage in predatory bidding will be successful, because it is more likely both that prices will increase in the short term without significantly increasing supply * * * and that prices can be forced down in the long term without significantly reducing supply (thereby facilitating recoupment)."[11] Therefore, adopting Weyerhaeuser's preferred approach would not eliminate the burdens associated with evaluating elasticity in the relevant market because assessing the probability of recoupment requires analyzing market elasticity.

Furthermore, the Ninth Circuit's conclusion was correct: the Pacific Northwest market for alder sawlogs is inelastic. Put more simply, in the short term, the

---

[10] Brief for the United States as Amicus Curiae Supporting Petitioner at 25. *See also* Brief for the Petitioner at 32-34.
[11] Brief for the United States as Amicus Curiae Supporting Petitioner at 24.

alder-sawlog supply does not increase in response to increasing prices, and supply does not decrease in response to declining prices. The market's inelasticity is graphically depicted by trial exhibits 80, 96, and 97.[12] Exhibit 97 shows that prices for alder sawlogs increased steadily from 1996 to 2001, with an especially dramatic rise from late 1998 through early 2001.[13] Exhibits 80 and 96 show alder sawlog supply. If the market were elastic, one would expect to see an increase in supply corresponding to the increase in price. Instead the supply remained stable from 1996 through 2001, except for a small *decrease* in supply during 2000 and early 2001. Thus, while prices went up, supply remained mostly unchanged. Weyerhaeuser contends the record lacks any support for the Ninth Circuit's conclusion that the Pacific Northwest alder-sawlog market is inelastic.[14] But these exhibits prove otherwise.

The market's inelasticity is easy to explain; in fact, it is precisely what one would expect based on the market's unique characteristics.

Two factors primarily account for the market's inelasticity. First is the nature of the product itself. In some markets, a manufacturer can respond to a price increase by simply increasing production. But it takes 30-50 years for an alder tree to grow to the point where it is ready for harvest. Therefore, the supply of alder available for harvest today is fixed by planting decisions made decades ago, based on market conditions then. Timber supply is relatively elastic in the *long term* but not in the *short term*, because there is no way to bring a

---

[12] Exhibit 96 is at JA 923a; exhibits 80 and 97 are reproduced in Appendix A and Appendix B to this brief.

[13] Appendix B.

[14] Brief for the Petitioner at 33 ("For one thing, there is no factual basis for the court's assertion [that the market is inelastic].").

tree to maturity in less time than nature requires just because prices are attractive.

Second, in the Pacific Northwest, alder is primarily a come-along species. The parties' glossary of terms defined "come along species" as "A species within a stand of timber that is typically cut as a consequence of a harvest of a dominant species."[15] The trial evidence established that alder is a come-along species, harvested as a byproduct of the dominant softwoods harvest. For example, an exhibit in one of the follow-on cases against Weyerhaeuser said that 83 percent of the alder harvest was a byproduct of the softwoods harvest and, consequently, was not price-sensitive.[16] In other words, that alder would be harvested without regard to price. As a result, the supply of Pacific Northwest alder does not change in response to price; instead, alder supply is primarily a function of the softwoods harvest.

Thus, the finite number of harvestable alder trees provided by nature, combined with alder's status as a come-along species, create an inelastic market where the supply of alder logs does not increase in response to higher prices.

Weyerhaeuser and *amici curiae* Timberland Owners and Managers dispute this reality, but identify no record evidence tending to prove the market's elasticity. Instead, they rely on isolated sentences lifted from articles concerning forest economics.[17] None of the articles cited addresses the elasticity of the unique alder-sawlog market.

---

[15] JA 145a.

[16] Westwood exhibit 2740 at 1 (available at www.alderantitrust.com).

[17] Brief of *Amici Curiae* Timberland Owners and Managers Supporting Petitioner at 15-16.

E. The Pacific Northwest alder-sawlog market is vulnerable to predatory conduct by a dominant firm.

This Court has stressed that antitrust cases should turn on "actual market realities." *Eastman Kodak*, 504 U.S. 466-67. Therefore, as this Court decides whether to apply the *Brooke Group* test to anticompetitive conduct in the Pacific Northwest market for alder sawlogs, it is essential to consider the economic realities of that market.

As Weyerhaeuser recognized when it devised its plan to monopolize the market, the Pacific Northwest alder-sawlog market has several characteristics that make it particularly susceptible to a multi-faceted predation assault of the type Weyerhaeuser launched here.

The market's inelasticity is one such characteristic. Weyerhaeuser's overall strategy was two-fold: (1) acquire as many logs as possible, thereby depriving its competitors of the inputs they needed to remain in operation, and (2) drive up the cost of the logs that Weyerhaeuser did not acquire, thereby ensuring that its competitors paid prices that rendered their operations unprofitable. Such a strategy would be unlikely to succeed in an elastic market, which would respond to Weyerhaeuser's predation by bringing more logs to the market. But, as this case demonstrates, such a strategy can (and did) succeed in an inelastic market where supply does not increase in response to such predatory conduct. Because the market's inelasticity meant that log supply would not increase as prices went up, Weyerhaeuser knew it could use its market power to drive up prices, forcing its competitors into a Hobson's choice between either paying exorbitant prices for logs or buying no logs at all.

Another characteristic that makes the alder-sawlog market vulnerable to predation is its closed nature. Weyerhaeuser's scheme could not have succeeded if sawmills could have responded to Weyerhaeuser's tactics by acquiring alder from outside the Pacific Northwest. But undisputed evidence at trial showed that was infeasible for two reasons. First, it is expensive to transport logs to a mill, which makes it economically irrational to import logs from far away. (J.A. 379a.) For that reason, most alder logs are processed at mills within 100 miles from the harvest sites. (J.A. 153a.) Second, alder logs stain relatively soon after harvest, especially if exposed to heat. (J.A. 184a.) Such staining decreases a log's value and produces less valuable timber. (J.A. 184a-185a, 510a.) Long-distance transportation is undesirable because it increases the risk of staining. For these reasons—the high cost of transportation and the heightened risk of staining—alder sawlogs are rarely imported into or exported out of, the Pacific Northwest. (J.A. 153a, ¶ 15; J.A. 268a-270a.) These market characteristics mean that sawmills such as Ross-Simmons cannot combat predatory conduct by obtaining logs from outside the Pacific Northwest.

Another relevant market characteristic is the high barriers to entry. Barriers to entry are relevant because in a market with low barriers to entry, Weyerhaeuser's strategy would have been less likely to succeed; once Weyerhaeuser eliminated competition and drove down prices, competitors would enter the market to take advantage of the monopsony prices Weyerhaeuser had created. But where barriers to entry are high, a predatory scheme such as Weyerhaeuser's has a greater likelihood of success because it is difficult for competitors to enter the market and compete with the monopsonist.

There are significant barriers to entry into the Pacific Northwest market for alder sawlogs. One barrier is Weyerhaeuser's presence. (J.A. 369a, 396a.) A dominant firm's presence in a market is, by itself, a barrier to entry by competitors. (J.A. 369a, 396a.) Here, Weyerhaeuser, with approximately 75 percent of the market for alder sawlogs, is the market's dominant firm, and any firm considering entering the market knows it must compete with Weyerhaeuser. Consequently, Weyerhaeuser's market domination by itself is a barrier to entry.

A second barrier to entry is the inadequate supply of alder sawlogs. (J.A. 368a-369a.) A sawmill cannot survive without an adequate supply of timber within a close distance to the mill. The lack of available sawlogs is another reason a prospective competitor might choose to not enter the market and compete with Weyerhaeuser. (J.A. 369a.)

A third barrier to entry is the cost of building a mill. Construction costs are $20-$25 million—a sum sufficient to impede many would-be competitors from entering the market. (J.A. 370a.) Furthermore, a dominant firm's presence in the market makes it more difficult for potential competitors to secure the financing necessary for such a project since lenders are reluctant to make loans to firms facing such daunting competition. While this effect might be difficult to measure, and its benefit to the predator difficult to quantify, that does not lessen its negative effect on competition.

All of these barriers to entry combine to make the market vulnerable to anticompetitive conduct.

Finally, to understand how Weyerhaeuser's predatory bidding scheme could work, it is essential to understand that Weyerhaeuser needed to drive up the price of logs in only a relatively small segment of the

overall market. There are four sources of alder logs available to Pacific Northwest mills: forest land owned by the mill; large private or industrial landowners; small private landowners; and public land (which, in the Pacific Northwest, is primarily state-owned land). Weyerhaeuser used various tactics, such as exclusive contracts and tying arrangements, to secure most of the supply available from large industrial landowners and public lands. Therefore, alder from those sources was not available to Ross-Simmons (or other Weyerhaeuser competitors) at any price. What remained open for bid was the relatively small portion of the market supplied by small landowners. And it was there that Weyerhaeuser focused its predatory bidding practices, driving up the price for its competitors.

An exhibit from one of the follow-on cases demonstrates how the practice worked.[18] Weyerhaeuser filled much of its timber requirements from its own land (blue bubbles) and exclusive arrangements with large landowners (white bubbles). Weyerhaeuser paid substantially less for that timber than it paid in the remaining fraction of the market where it competed with Ross-Simmons and others (red bubbles). The important point is this: to succeed, Weyerhaeuser did not need to drive up the price of logs in the entire market; instead, it was sufficient to drive up the price in the segment of the market where it competed with Ross-Simmons.

This combination of characteristics makes the market especially vulnerable to a predatory monopolist seeking to use its market power to extinguish competition. The rule adopted by this Court must be adequate to reflect these market realities and protect competition.

---

[18] Appendix C.

F. *Reid Bros.* undermines Weyerhaeuser's contention that the Ninth Circuit's decision will have harmful economic repercussions.

Weyerhaeuser and its *amici* make two points repeatedly: (1) this Court should adopt a narrow test for finding liability because a predatory bidding scheme is unlikely to be attempted and is even less likely to succeed; and, (2) if left unaltered, the Ninth Circuit's decision will spawn harmful economic disruption by chilling legitimate and healthy competition. But the Ninth Circuit's experience with similar predatory schemes suggests these views are overstated, if not entirely baseless.

Weyerhaeuser's predatory scheme in this case was similar to one the Ninth Circuit addressed in *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983). In *Reid Bros.*, the two defendants originally came to southeast Alaska in the 1950s after entering into longterm contracts with the Forest Service, entitling each to harvest timber from designated allotment areas for 50 years. Outside these allotment areas, timber in the Tongass National Forest was sold periodically at public auction. At the time, there were numerous loggers and competing sawmills in southeast Alaska that bid at these timber sales. The Forest Service contemplated a genuinely competitive market for the openly-bid timber sales, which were supposed to provide the transaction evidence needed for periodic reappraisals of the stumpage rates paid by the two defendants for timber delivered under the 50-year contracts.

The two dominant firms conspired to monopolize the southeastern Alaska timber industry using some of the same tactics that Weyerhaeuser later employed against its rivals in the Pacific Northwest. Those tactics

included driving up the price of timber to inflict economic pain on competitors, and using anticompetitive maneuvers to prevent rival mills from acquiring logs. *Id.* at 1297-98. In affirming the judgment against the defendants for violating Sherman Act §§ 1 and 2, the court rejected the defendants' argument that intentionally driving up the price of timber for the purpose of excluding competition should be *per se* lawful unless "the high prices paid for standing timber would prevent the defendants from covering their marginal costs on the ultimate sale of the processed timber." *Id.* at 1298 n.5. The court held that such a narrow and mechanical test was inappropriate where "there is direct evidence that the defendants aimed to exclude competition in order to enhance their long-term market position" and that "the blind application of a numerical test would only frustrate the intent of the Sherman Act." *Id.*

Reid Bros. is instructive for two reasons. First, it refutes Weyerhaeuser's contention that this Court should discount the likelihood of a successful attempt to unlawfully monopolize a regional timber market. *Reid Bros.* shows that not only *can* it be done, but it *has* been done—and that regional timber markets are especially susceptible to such anticompetitive conduct.

Second, *Reid Bros.* provides a concrete counterpoint to Weyerhaeuser's hyperbolic speculation that the Ninth Circuit's decision in this case will breed economic chaos. *Reid Bros.* rejected the argument that predatory bidding should be immune from antitrust scrutiny so long as the price paid for the input is not so great that the predator cannot cover its costs when it sells the finished product. In other words, *Reid Bros.* rejected the very argument that Weyerhaeuser advances here. *Reid Bros.* was decided in 1983, yet there has been no epidemic of chaos, confusion, or false

positives. Indeed, *Reid Bros.* did not even deter Weyerhaeuser from embarking on an anticompetitive campaign almost identical to the one condemned in *Reid Bros.* Consequently, *Reid Bros.* should, at a minimum, cause this Court to view with skepticism Weyerhaeuser's doomsday scenario.

The greater risk is if this Court adopts Weyerhaeuser's position. If this Court agrees with Weyerhaeuser, this case will provide a roadmap for any firm dealing with commodities with an inelastic supply that wants to establish monopsony while insulating itself from legal attack. That path would be: (1) acquire a substantial portion of the inelastic supply; (2) outbid competitors for the open-market supply; (3) subsidize the adverse effects of high prices for open-market supplies with below-market purchases of the captive supplies, driving competitors out of business; and (4) once competition has been eliminated, drop the bids for open-market supplies, thus increasing manufacturing margin and recouping any losses from the predation.

As demonstrated by *Reid Bros.*, the result of a successfully monopsonized alder log market is harm both to log sellers and to lumber consumers. Woodland owners suffer lower log prices and avoid replanting alder. Sawmills and loggers are eliminated. And consumers experience decreased alder lumber production and higher prices. *Those* are the real risks posed by this case, and those are the risks that motivated the Forest Industry Participants to submit this brief urging the Court to decline Weyerhaeuser's invitation to apply the *Brooke Group* test here.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

R. DANIEL LINDAHL
Counsel of Record
BULLIVANT HOUSER BAILEY, PC
300 PIONEER TOWER
888 S.W. FIFTH AVENUE
PORTLAND, OREGON 97204
(503) 228-6351

Counsel for Amici Curiae

October 12, 2006

APPENDIX

APPENDIX A

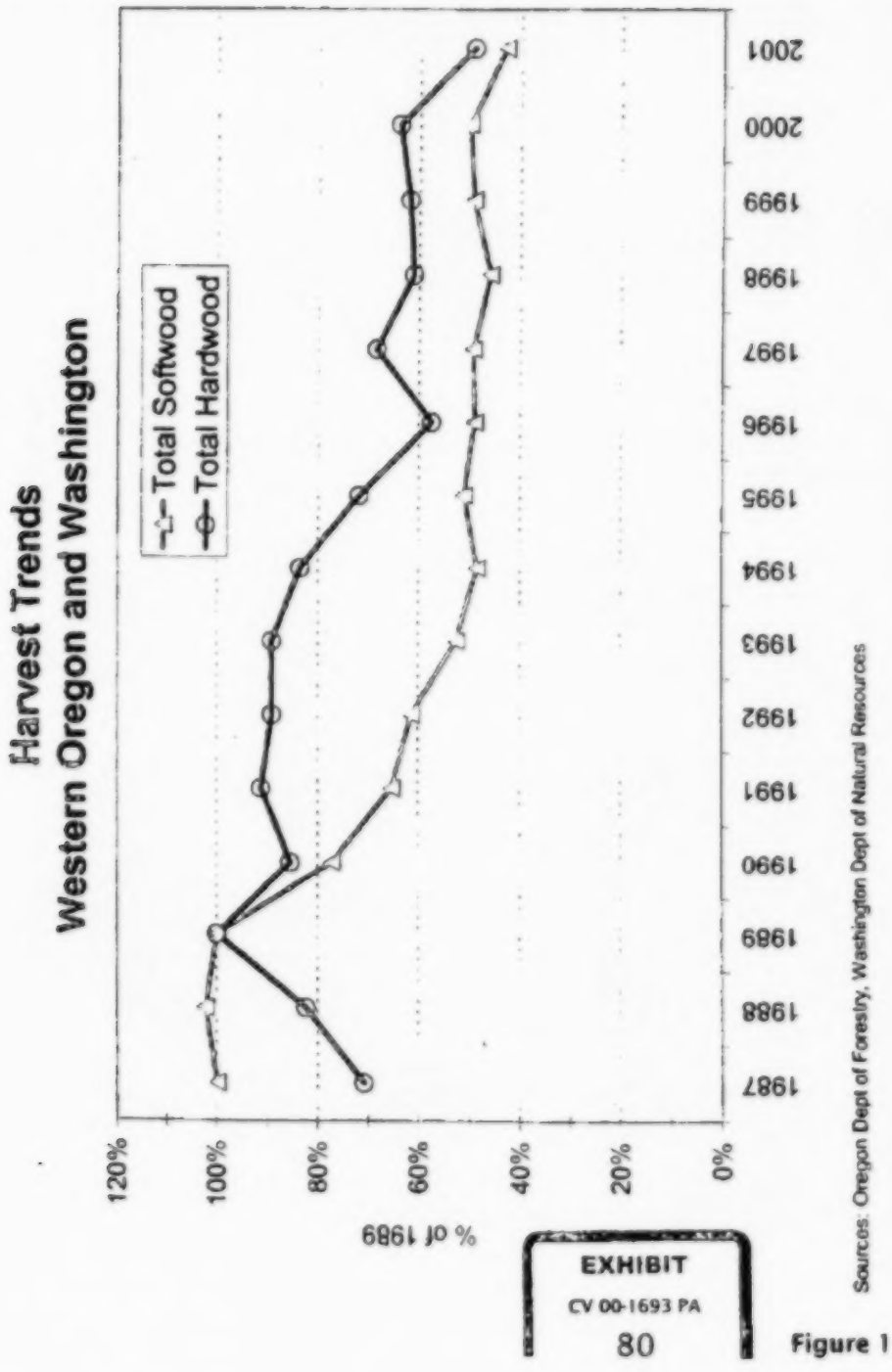

EXHIBIT
CV 00-1693 PA
80

Figure 1

APPENDIX B

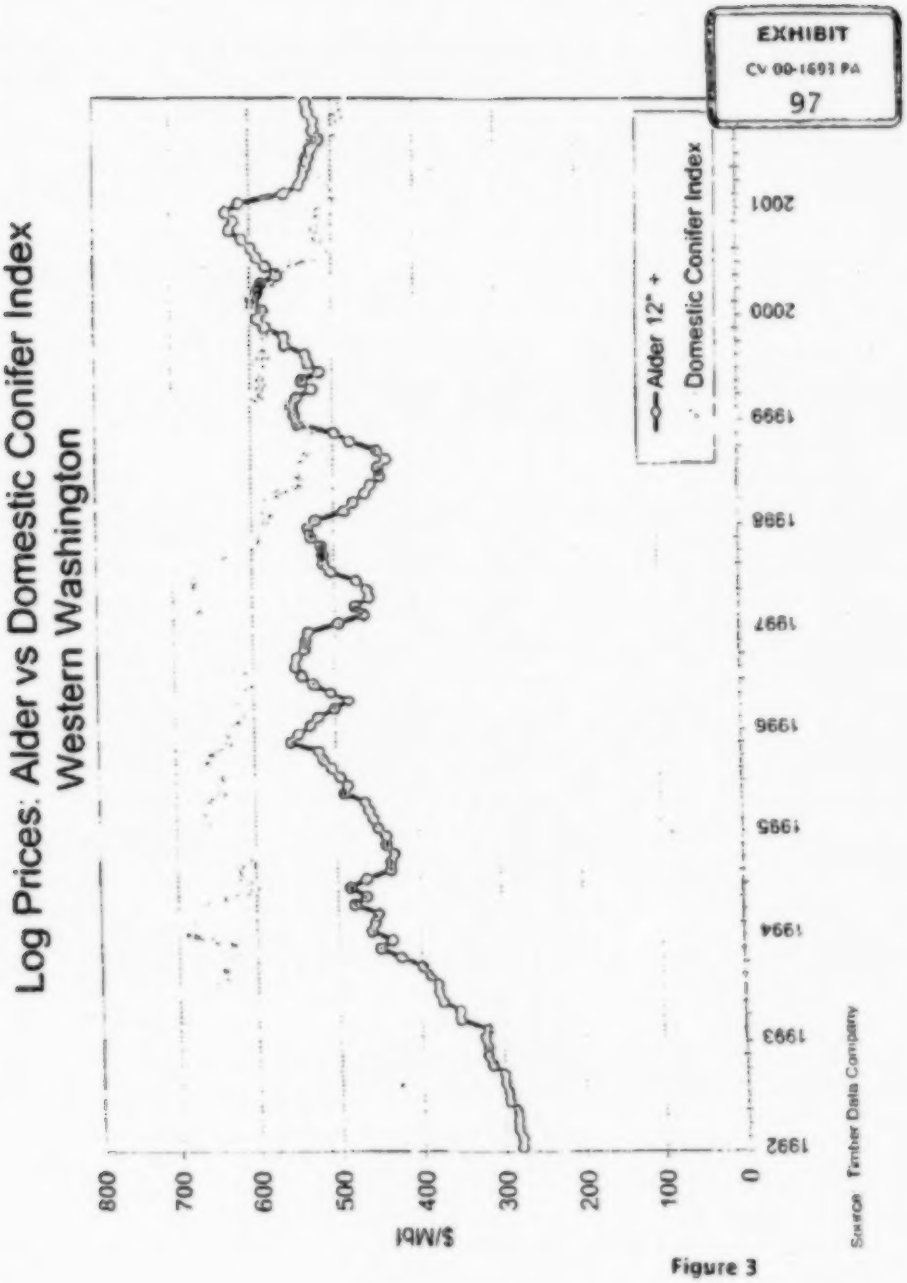

Figure 3

APPENDIX C

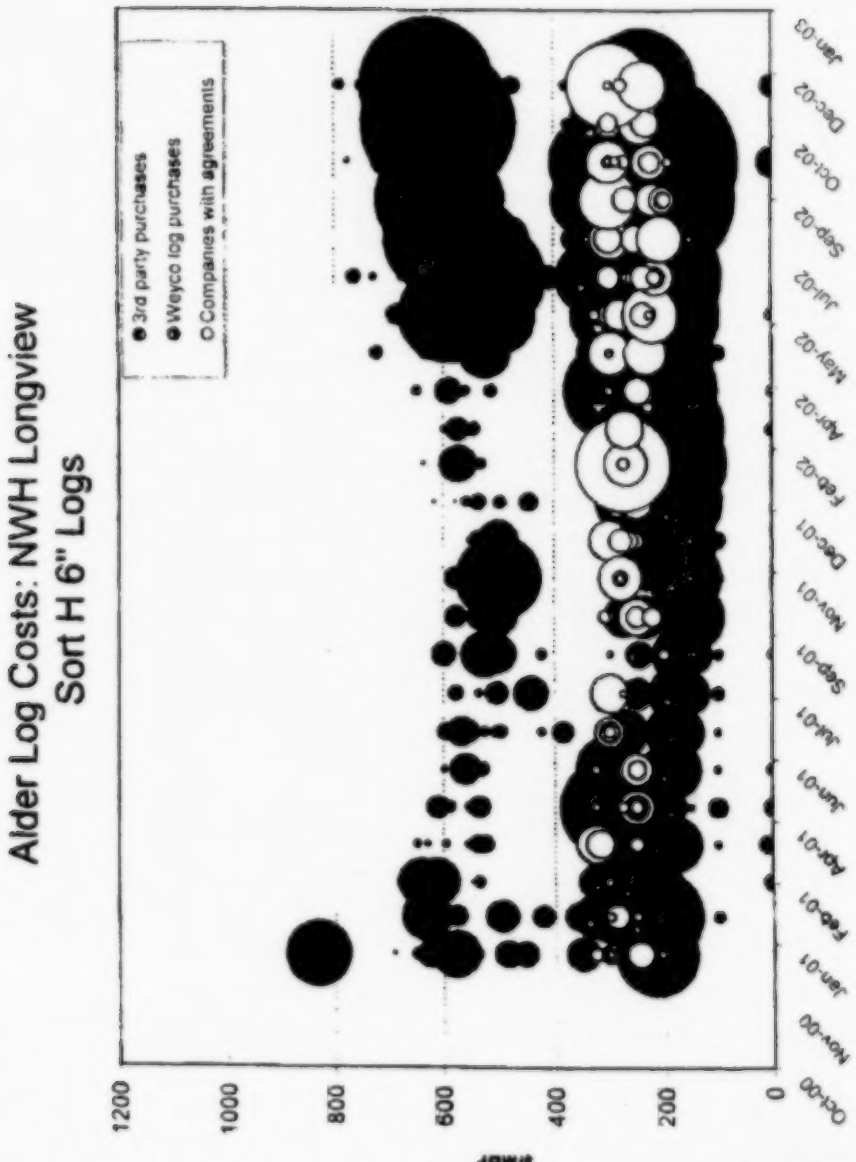

EXHIBIT
CV 04-1049 PA
15951